
15 Ind. Cas. 683

Calcutta High Court

Case No: None

Jugal Kishore Marwari
and Another

APPELLANT

Vs

Bejoy Krishna
Mukherjee and Ambika
Debi

RESPONDENT

Date of Decision: May 20, 1912

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 93

Citation: 15 Ind. Cas. 683

Hon'ble Judges: Mookerjee, J; Beachcroft, J

Bench: Division Bench

Judgement

1. We are invited in this Rule to set aside an order under Rule 93 of Order XXI of the Code of 1908. The petitioners in execution of a decree against their judgment-debtor, one Bejoy Krishna Mukherjee, attached his house and the adjoining lands. Thereupon, one Ambika Debi, the mother of the judgment-debtor and the opposite party in this Rule, preferred a claim under Rule 58 of Order XXI of the Code on the 10th December 1909. Her allegation at the time was that the house and the land be-longed to her and that she. was in possession thereof in her own right. She did not, however, prosecute her claim, with the result that it was dismissed on the 9th April 1910. Execution thereupon proceeded on the basis of the decree, and on the 11th June 1910, the decree-holders purchased the property at the execution sale. They subsequently applied for delivery of possession, and on the 20th November 1911, symbolical possession was delivered to them. Later on, they applied for delivery of actual possession. The peon, who went to execute the writ, reported that he had been obstructed, and on the 13th January 1912, the mother of the judgment-debtor Put in an application under Rule 97 of Order XXI of the Code. The Court did not investigate whether the objector was bona fide in possession of the property; but made an order the effect of which was denial of all assistance to the

auction-purchasers in their endeavour to obtain possession of the property purchased by them. The order of the Court below clearly cannot be supported.

2. Even if it be assumed that the application of the objector could have been entertained, the Court could not make an order under Rule 99 without an investigation as to whether she was in possession of the property in good faith and on her own account. This position has not been controverted on behalf of the opposite party and it has been suggested that the case should be remitted to the Court below in order that the requisite inquiry may be made. We are not, however, prepared to accede to this prayer. The application clearly ought not to have been entertained. The objector, as we have already stated, made an application under Rule 58 on the 10th December 1909. Her claim was dismissed on the 9th April 1910. It is true that there was no investigation on the merits but that was entirely by reason of her own default; she wilfully deprived herself of the opportunity open to her at that stage. Rule 63 shows that where a claim of this character has been preferred, the party against whom the order has been made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order is conclusive. It has been contended, however, on behalf of the opposite party, on the authority of the decision in the case of *Kunj Rehari Lal v. Kandh Prashad Narain Singh* 6 C.L.J. 362, that as there was no investigation on the merits, she is in the same position as if she had never made an application under Rule 58. We are of opinion that this position cannot be supported. No doubt, in relation to the question of limitation applicable to a suit of the description mentioned in Rule 63, it has been held that Article 11 of the second Schedule of the Limitation Act does not apply if the application has been refused without an investigation on the merits. *Kallar Singh v. Toril Mahton* 1 C.W.N. 24. Upon this point, however, there is a divergence of judicial opinion and there is weighty authority in support of the view that where an application has been dismissed, with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. *Gooroo Das v. Sona Monee* 20 W.R. 343; *Sreemunto Hajrah v. Tajooddeen* 21 W.R. 409; *Tripoorra Soonduri Debia v. Ijjutoonnissa* 24 W.R. 411; *Sadut Ali v. Ramdhone* 12 C.L.R. 43. But it is not necessary for our present purpose to express any opinion upon this question. It is sufficient to hold that, on the face of Rule 63, the order of refusal is plainly final till a regular suit has been instituted and successfully prosecuted. Consequently, the objector cannot now be allowed to practically re-iterate the claim which she preferred on the 10th December 1909, and which was disallowed without investigation by reason of her own default. The petition of objection filed on the 13th January 1912, in this view, ought not to have been entertained. This conclusion is supported by the decision in *Sankar Nath Pandit v. Moden Mohan Das* (7).

3. The result is that the Rule is made absolute and the order of the Court below set aside. That Court is directed to place the auction-purchasers in actual possession of the property and to render such assistance to the peon as may be necessary to carry out the order of the Court. The petitioners are entitled to their costs in this Court. We assess the hearing-fee at three gold mohurs.